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# Notes

## In the Wake of *Williams v. State*: The Past, Present, and Future of Education Finance Litigation in California

CHRISTOPHER R. LOCKARD\*

### INTRODUCTION

A general diffusion of knowledge and intelligence is essential to the preservation of the rights and liberties of the people.<sup>1</sup>

The landmark 1971 California Supreme Court ruling in *Serrano v. Priest*<sup>2</sup> that public education was a fundamental right and wealth-based discrimination a suspect classification set off a series of major education reforms that radically transformed the way the state's school system operates. The *Serrano* ruling also spurred an onslaught of education finance litigation nationwide, leading to major education reforms in dozens of states. Now thirty-five years later, another piece of education litigation has been resolved, resulting in a billion new dollars in funding for California's poorest schools. In *Williams v. State*,<sup>3</sup> formally settled on March 23, 2005, the plaintiffs argued that a lack of basic materials, unqualified teachers, and unsafe facilities in many of the state's poorest schools resulted in numerous violations of the federal and state equality guarantees and the state's "free school" guarantee.

The strategies and legal arguments used by the *Williams* plaintiffs, along with those in several recent cases in other states, provide clues as to what the future could hold in store for education finance litigation in

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1. CAL. CONST. art. IX, § 1.

2. 487 P.2d 1241 (Cal. 1971).

3. Filed in San Francisco Superior Court on May 17, 2000, as case No. 312236.

California. From forcing the creation of the Quality Education Commission, establishing a state-wide preschool system, or even mandating a complete overhaul of the state's financing system, such litigation could have a profound effect on the state's education system. What the results will be are far from known. But it is clear that the multitude of battles over California's commitment to education that have shaken the system over the past four decades are not showing any signs of slowing down.

In Part I, this Note traces the history of education reform in California, from the first *Serrano* ruling to the ensuing backlash of Proposition 13, to attempts to repair the system through measures such as Proposition 98, and on to the current state of affairs. Part II analyzes the recent litigation in other states, focusing particularly on cases in New Jersey, New York, Arkansas and Massachusetts.<sup>4</sup> In Part III, the Note details the *Williams* case, discussing the strategy behind the lawsuit, how the State defended it, and what the settlement means for California's schools. Finally, Part IV discusses what the strategies used in *Williams* and other states tell us about what types of litigation California may soon be seeing.

### I. CALIFORNIA'S TUMULTUOUS FINANCING REFORM

Article IX, section 5, of the California Constitution requires the state to provide "a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year." The California courts recognized long ago that this "free school" guarantee created guaranteed rights in a public school education.<sup>5</sup> The idea of using litigation to enforce these rights arose in the aftermath of *Brown v. Board of Education*.<sup>6</sup> In one of the first instances in which such a strategy was employed, an African-American student in Los Angeles County successfully challenged a school district's denial of his transfer request.<sup>7</sup> This case was followed by a string of other

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4. See *Lake View Sch. Dist. No. 25 v. Huckabee*, 10 S.W.3d 892, 898-99 (Ark. 2000); *Hancock v. Driscoll*, 2004 Mass. Super. LEXIS 118; *Abbott v. Burke*, 495 A.2d 376, 380 (N.J. 1985); *Campaign for Fiscal Equity v. State*, 655 N.E.2d 661 (N.Y. 1995).

5. See *Piper v. Big Pine Sch. Dist.*, 226 P. 926, 928 (Cal. 1924).

The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state.

*Id.*; *Ward v. Flood*, 48 Cal. 36, 50 (1874) (The benefit of attending public school is "a legal right . . . entitled to be protected by all the guarantees by which other legal rights are protected.").

6. 347 U.S. 483 (1954).

7. *Jackson v. Pasadena City Sch. Dist.*, 382 P.2d 878, 882 (Cal. 1963) ("The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.").

lawsuits over school desegregation that saw the courts aggressively pursue integrated schools.<sup>8</sup> Although school districts were no longer officially segregated, all students were far from being treated equally.

#### A. THE EARTHQUAKE: *Serrano v. Priest*

At the end of the 1960s, public schools in California received almost sixty percent of their funding from property taxes paid directly to local school districts.<sup>9</sup> This system resulted in a vast disparity in the amount of money each school district received per pupil from property taxes. For example, in 1969 San Francisco generated \$1,063 per pupil from property taxes, while Fresno generated only \$323.<sup>10</sup> Although the state provided some funds to compensate the poorer districts, this did little to help. Even after state aid was accounted for, San Francisco still had almost twice as much money to spend per pupil as did Fresno.<sup>11</sup> To exacerbate matters, many of the districts with the lowest amount to spend per pupil had to institute higher property tax rates just to get to that low level.<sup>12</sup> Beverly Hills, which spent twice as much per pupil as Baldwin Park, had a property tax rate half that of Baldwin Park.<sup>13</sup>

It was against this backdrop that the *Serrano* plaintiffs formulated their lawsuit. The litigation was organized by UCLA law professor Harold Horowitz and Derrick Bell, Jr., the head of the Western Center on Law and Policy.<sup>14</sup> They brought a suit on behalf of twenty-seven children in Los Angeles County and other unnamed children statewide, along with their parents, arguing that differences in the quality of education among school districts were systemically related to race and wealth, and that a disproportionate number of minority students received an inferior education.<sup>15</sup> They also challenged the fact that many of these students' parents were forced to pay higher property tax rates.<sup>16</sup> The plaintiffs argued that the overall state school finance system violated both the California Constitution and the United States Constitution's

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8. See, e.g., *McKinny v. Oxnard Union High Sch. Dist. Bd. of Trs.*, 642 P.2d 460 (Cal. 1982); *Crawford v. Bd. of Educ.*, 551 P.2d 28 (Cal. 1976); *NAACP v. San Bernardino Unified Sch. Dist.*, 551 P.2d 48 (Cal. 1976); *Santa Barbara Sch. Dist. v. Superior Court of Santa Barbara Co.*, 530 P.2d 605 (Cal. 1975); *San Francisco Unified Sch. Dist. v. Johnson*, 479 P.2d 669 (Cal. 1971); *Tinsley v. Palo Alto Unified Sch. Dist.*, 154 Cal. Rptr. 591 (Ct. App. 1979).

9. JON SONSTELIE ET AL., PUB. POLICY INST. OF CAL., FOR BETTER OR FOR WORSE? SCHOOL FINANCE REFORM IN CALIFORNIA 19 (2000), available at [http://www.ppic.org/content/pubs/R\\_200JSR.pdf](http://www.ppic.org/content/pubs/R_200JSR.pdf) (last visited Mar. 14, 2005).

10. *Id.* at 24.

11. *Id.*

12. *Id.* at 26.

13. William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607, 610 (1996).

14. SONSTELIE, *supra* note 9, at 8-9.

15. *Id.* at 9-10.

16. *Serrano v. Priest*, 487 P.2d 1241, 1245 (Cal. 1971) [hereinafter *Serrano I*].

#### Fourteenth Amendment.<sup>17</sup>

The California Supreme Court agreed, ruling in 1971 that the state system of relying on local property taxes violated the Fourteenth Amendment because of the wide financing disparities among school districts.<sup>18</sup> Declaring that education was a “fundamental interest” and that discrimination on the basis of wealth was an inherently suspect classification, the court held that the state’s school finance system “invidiously discriminates against the poor because it makes the quality of a child’s education a function of the wealth of his parents and neighbors.”<sup>19</sup> By a 6–1 vote, the court overruled the lower court’s dismissal of the claim and remanded the case, saying that its holding furthers “the cherished idea of American education that in a democratic society free public schools shall make available to all children equally the abundant gifts of learning.”<sup>20</sup>

In direct response to the *Serrano* ruling, in 1972 the California Legislature passed Senate Bill 90, which increased state funding for districts with low property tax revenue.<sup>21</sup> The bill also put a ceiling on how much property tax revenue a district could receive per pupil.<sup>22</sup> Revenue in the lowest-spending districts could grow by as much as fifteen percent a year, while the highest-spending districts were limited to just three percent growth.<sup>23</sup> Only a majority of a district’s electorate could override these revenue limits.<sup>24</sup>

Shortly after Senate Bill 90 became law, the remanded trial (*Serrano II*) on the *Serrano* plaintiffs’ factual allegations began, with the court now considering the constitutionality of the state school system post-Senate Bill 90.<sup>25</sup> However, between the state supreme court’s *Serrano I* ruling in August 1971 and the end of the second trial in December 1976, the United States Supreme Court rejected a constitutional challenge to Texas’ school finance system, holding that education was not a fundamental constitutional right.<sup>26</sup> Thus on remand, the trial judge, based on dicta in the *Serrano I* decision, instead struck down the California system as violating the equal protection provisions of the state

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17. *Id.* at 1244.

18. Fischel, *supra* note 13, at 610.

19. *Serrano I*, 487 P.2d at 1244, 1264.

20. *Id.* at 1266.

21. Fischel, *supra* note 13, at 610.

22. EdSourceOnline, SELECTED SCHOOL FINANCE LAWS AND POLICIES, at [http://www.edsource.org/edu\\_fin\\_law.cfm](http://www.edsource.org/edu_fin_law.cfm) (last visited Feb. 22, 2005) [hereinafter SELECTED SCHOOL FINANCE].

23. SONSTELIE, *supra* note 9, at 44.

24. *Id.* at 45.

25. *Id.*

26. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (“[T]his is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights.”).

Constitution.<sup>27</sup>

In 1976, the California Supreme Court affirmed the decision 4–3, holding that “[t]he constraints of federalism . . . are not applicable to this court in its determination of whether our own state’s public school financing system runs afoul of state constitutional provisions.”<sup>28</sup> The court said the trial court properly applied strict scrutiny and did not err in finding that “the state had failed to bear its burden and that the financing system before it was invalid as denying equal protection of the laws as guaranteed by the California Constitution.”<sup>29</sup> The decision required the state to eliminate all wealth-related differences in school funding, effectively resulting in a new litmus test: per pupil expenditures could not vary by more than \$100 among all the school districts in the state.<sup>30</sup>

To comply with the *Serrano II* ruling, the legislature passed Assembly Bill 65.<sup>31</sup> The bill added state aid to the poorest districts, placed stricter limits on revenue for the richest districts, and transferred some of the wealth from the rich districts to the poor districts.<sup>32</sup> However, before the law could even take effect, state officials received a jolt from *Serrano II*’s first aftershock.

#### B. THE AFTERSHOCKS: PROPOSITION 13 AND THE ANTI-TAX BACKLASH

During the 1970s, property values throughout California increased dramatically, resulting in an influx of new tax revenue.<sup>33</sup> Legislators, knowing that a response to the *Serrano* rulings would be expensive, did not actively encourage a reduction in property tax rates.<sup>34</sup> Anti-tax advocates seized upon these surpluses, and pushed forward a bold initiative to cut property tax revenues by more than half.<sup>35</sup> Proposition 13 in effect changed local property taxes into a statewide tax.<sup>36</sup> It placed strict limits on property tax rates, capping them at one percent of property value, which could only increase by a maximum of two percent a year.<sup>37</sup> It also required that two-thirds of the voters in a district approve any special taxes,<sup>38</sup> as well as a two-thirds vote of the legislature to enact

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27. 8 WITKIN SUMMARY OF CALIFORNIA LAW, XI, § 697(b), at 169 (1988).

28. *Serrano v. Priest*, 557 P.2d 929, 952 (Cal. 1976) [hereinafter *Serrano II*].

29. *Id.* at 958.

30. Fischel, *supra* note 13, at 611.

31. *Id.*

32. *Id.*

33. SONSTELIE, *supra* note 9, at 51.

34. *Id.*

35. Fischel, *supra* note 13, at 612.

36. SONSTELIE, *supra* note 9, at 50.

37. JEFFREY CHAPMAN, PUB. POLICY INST. OF CAL., PROPOSITION 13: SOME UNINTENDED CONSEQUENCES 3 (1998), available at [http://www.ppic.org/content/pubs/OP\\_998JCOP.pdf](http://www.ppic.org/content/pubs/OP_998JCOP.pdf) (last visited Mar. 15, 2005).

38. *Id.*

new taxes.<sup>39</sup> The initiative passed overwhelmingly on June 6, 1978.<sup>40</sup>

The passage of Proposition 13, which some scholars attribute directly to the *Serrano II* ruling,<sup>41</sup> forced the legislature to scramble to find a solution to its new revenue hurdles. Several bills were passed to bring the tax system in line with the voter mandate. The first piece of legislation allocated property tax revenue to local governments in proportion to their previous revenue.<sup>42</sup> The second bill guaranteed municipalities block-grant aid and increased state aid to schools to offset the property tax shifts.<sup>43</sup> It contained a “*Serrano* closure formula” intended to close the gap between high and low spending districts by allowing low spending districts higher inflationary increases.<sup>44</sup> Voters followed that up by passing Proposition 4, also known as the Gann Limit, which established a system of spending limits.<sup>45</sup>

These changes significantly narrowed the disparity in funding between school districts, but did not bring all districts within the \$100 per pupil requirement imposed in *Serrano II*.<sup>46</sup> So in 1983, the *Serrano* plaintiffs again went to court, arguing that the state had not complied with the *Serrano II* order.<sup>47</sup> The trial judge held that legislators had “done all that is reasonably feasible to reduce disparities in per-pupil expenditures to insignificant differences.”<sup>48</sup> This decision was later upheld by the court of appeal and supreme court, leaving California’s once-prized education system with one of the lowest rates of spending per pupil and spending as a percent of personal income of any state in the country.<sup>49</sup>

### C. REBUILDING A SHATTERED SYSTEM

As the *Serrano* plaintiffs fought their final battle, education advocates tried new approaches. Senate Bill 813, passed in 1983, added money for schools by equalizing revenue limits among districts and

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39. UNIV. OF CAL. INST. OF GOVERNMENT STUDIES, TAX AND EXPENDITURE LIMITATION IN CALIFORNIA: PROPOSITION 13 & PROPOSITION 4, at <http://www.igs.berkeley.edu/library/htTaxSpendLimits2003.html> (last visited Feb. 22, 2005).

40. Fischel, *supra* note 13, at 612.

41. See generally *id.*, at 608–09.

By constitutionalizing the inherently political issue of school finance, the *Serrano* court left the California legislature with almost no room to respond to the property tax revolt of the late 1970s . . . *Serrano* forced a legislature that was apparently eager to help poorer schools to adopt a particular response that was so far from California voters’ demand for education that they brought Proposition 13 down on themselves.

42. See S.B. 154 (1978); SONSTELIE, *supra* note 9, at 52.

43. See A.B. 8 (1979); CHAPMAN, *supra* note 37, at 4.

44. *Serrano v. Priest*, 226 Cal. Rptr. 584, 594 (Ct. App. 1986) [hereinafter *Serrano III*].

45. CHAPMAN, *supra* note 37, at 5.

46. Fischel, *supra* note 13, at 613.

47. SONSTELIE, *supra* note 9, at 55.

48. *Serrano III*, 226 Cal. Rptr. at 604.

49. Fischel, *supra* note 13, at 613.

creating new categorical programs.<sup>50</sup> The following year, voters approved a state-wide lottery, directing thirty-four percent of its receipts into the state's public education system.<sup>51</sup> That same year, the California Supreme Court issued its decision in *Hartzell v. Connell*.<sup>52</sup>

In *Hartzell*, taxpayers in the Santa Barbara High School District challenged fees charged by the district for participation in extracurricular activities, arguing the fees violated the "free school" and equal protection guarantees of the state Constitution.<sup>53</sup> Article IX, section 5 of the California Constitution requires the legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district," which has been interpreted as mandating that children be educated at the public expense.<sup>54</sup> Acknowledging that extracurricular activities were "a fundamental ingredient of the educational process," the court held such activities did fall within the "free school" guarantee.<sup>55</sup> The court also rejected the defendant's argument that a fee waiver for needy students satisfies the "free school" guarantee, which "makes no distinction between needy and nonneedy families."<sup>56</sup>

In 1988, education advocates won another major battle with the passage of Proposition 98. The initiative guaranteed a minimum amount of money for elementary and secondary schools, based on a complex calculation that could only be overridden by a two-thirds vote of the legislature.<sup>57</sup> It is credited with protecting public schools from cuts that have cut into other areas of the state budget.<sup>58</sup> Advocates won another battle in 1990 when the passage of Proposition 111 raised both the Gann Limit and Proposition 98's minimum funding guarantee.<sup>59</sup> They followed that by successfully persuading the legislature to pass several bills intended to lower class sizes.<sup>60</sup>

While education advocates won these legislative battles, other advocates returned to the courtroom and won a mixed victory. After the Richmond Unified School District announced it would have to end the school year six weeks early because of a lack of funds, Richmond parents

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50. SELECTED SCHOOL FINANCE, *supra* note 22.

51. *Id.*

52. 679 P.2d 35 (Cal. 1984).

53. *Id.* at 38.

54. *Id.*

55. *Id.* at 42-43.

56. *Id.* at 43.

57. EDSOURCEONLINE, A PRIMER ON PROPOSITION 98, [http://www.edsource.org/pub\\_edfct\\_prop98.cfm](http://www.edsource.org/pub_edfct_prop98.cfm) (last visited Feb. 22, 2005).

58. *Id.*

59. SELECTED SCHOOL FINANCE, *supra* note 22.

60. *Id.*



filed for an injunction.<sup>61</sup> They argued closing school early would deny their children “their ‘fundamental right to an effective public education’ under the California Constitution.”<sup>62</sup> The case reached the California Supreme Court, which held that although the California Constitution does not guarantee uniform term lengths, this particular closure was unconstitutional because it “would cause an extreme and unprecedented disparity in educational service and progress.”<sup>63</sup> In holding that the state was obligated to intervene and assist with funding the district, the court noted that it is

well settled that the California Constitution makes public education uniquely a fundamental concern of the State and prohibits maintenance and operation of the common public school system in a way which denies basic educational equality to the students of particular districts. The State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity.<sup>64</sup>

The court also affirmed the trial court’s remedial order giving the state superintendent control of the local district.<sup>65</sup> However, the court reversed an order diverting state appropriations to Richmond as exceeding judicial authority.<sup>66</sup>

The efforts to reduce school district disparity have succeeded in many ways. The vast majority of California children now attend school districts that spend between \$6000–\$8000 per student and average nineteen to twenty-three pupils per teacher.<sup>67</sup> However, efforts to restore California’s once vaunted system to its previous stature have largely failed. One recent study ranked California’s average expenditures per child of \$7342 at thirty-fifth in the nation, lagging far behind states such as New York and New Jersey, which spend more than \$11,000 per child.<sup>68</sup> When education spending is compared to personal income, California looks even worse; although the state ranked ninth in the nation in per capita personal income, it ranks fortieth in education expenditures per \$1000 of personal income.<sup>69</sup> On class size the state fared even poorer—California ranks forty-eighth in the nation, with 20.8 pupils for every teacher, five more than the national average.<sup>70</sup> These figures are

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61. *Butt v. California*, 842 P.2d 1240, 1243–44 (Cal. 1992).

62. *Id.* at 1244.

63. *Id.* at 1252.

64. *Id.* at 1251.

65. *Id.* at 1260.

66. *Id.* at 1264.

67. EDUCATION DATA PARTNERSHIP, A SNAPSHOT OF CALIFORNIA, <http://www.ed-data.k12.ca.us/Articles/ASnapshotOfCalifornia.asp> (last visited Mar. 5, 2005).

68. EDUCATION DATA PARTNERSHIP, CALIFORNIA’S RANKINGS 2001–02, <http://www.ed-data.k12.ca.us/Articles/CalRankings.asp> (last visited Mar. 5, 2005).

69. *Id.*

70. *Id.*

especially tragic considering that California educates approximately one-eighth of the nation's children.<sup>71</sup>

## II. A NATIONWIDE EFFORT

California has not been alone in its tumultuous attempts to establish an acceptable system of public school funding. Since the first *Serrano* ruling thirty-five years ago, constitutional challenges to state education finance systems have been brought in forty-five states.<sup>72</sup> Litigation is currently pending in twenty-five states.<sup>73</sup> While states prevailed in the majority of cases during the 1970s and 1980s, education advocates learned from their losses and tweaked their strategies. Since 1989, plaintiffs have won about two-thirds of the major cases, forcing many states to amend their school financing methods radically.<sup>74</sup> All told, plaintiffs have won victories in twenty-six states.<sup>75</sup>

### A. A SHIFT FROM EQUITY TO ADEQUACY

The 1971 *Serrano I* ruling sparked litigation across the country, as advocates of public schools flocked to their courthouses to force reform in their states. But when the United States Supreme Court declared in its 1973 opinion in *San Antonio Independent School District v. Rodriguez* that the poor were not a suspect class and education was not a fundamental interest under the federal Equal Protection Clause, advocates suffered a major defeat.<sup>76</sup> *Rodriguez* invalidated the rationale adopted by courts in *Serrano I* and several other cases,<sup>77</sup> bringing a quick end to the "first wave" of school finance litigation.<sup>78</sup>

Advocates instead turned their attention to state constitutions, hoping to find guarantees there that were not present in the federal Constitution. This second wave of litigation won immediate success. The New Jersey Supreme Court, in an opinion handed down shortly after

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71. *Id.*

72. ACCESS, LITIGATION CHALLENGING CONSTITUTIONALITY OF K-12 FUNDING IN THE 50 STATES, at <http://www.schoolfunding.info/litigation/In-Process%20Litigations-09-2004.pdf> (last visited Sept. 22, 2005). As of August 30, 2005, lawsuits had been filed in every state except Delaware, Hawaii, Mississippi, Nevada and Utah.

73. *Id.*

74. Michael Rebell, *Educational Adequacy, Democracy and the Courts*, in *ACHIEVING HIGH STANDARDS FOR ALL* 218, 228 (Timothy Ready et al. eds., 2002).

75. ACCESS, "EQUITY" AND "ADEQUACY" SCHOOL FUNDING COURT DECISIONS, <http://www.schoolfunding.info/litigation/equityandadequacytable11-22-04.pdf> (last visited Mar. 9, 2005).

76. 411 U.S. 1, 40 (1973).

77. See, e.g., *Rodriguez v. San Antonio Indep. Sch. Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971); *Van Duzart v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971).

78. The "wave" description was first articulated by William Thro. See William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990).

Rodriguez, declared in *Robinson v. Cahill* that the New Jersey Constitution required the state to provide a "thorough and efficient" education to all children.<sup>79</sup> The *Robinson* court accepted "the proposition that the quality of educational opportunity does depend in substantial measure upon the number of dollars invested," but rejected all of the plaintiffs' arguments that there must be equal spending among districts.<sup>80</sup> Rather, the court found for the plaintiffs based on the argument that the state constitution's education article requires "an equal opportunity for children."<sup>81</sup> The court then held that these constitutional requirements could not be met by the current system of local taxation.<sup>82</sup>

The *Robinson* strategy of challenging the "equity" of school funding schemes based on guarantees in state law, which was also adopted in *Serrano II*, ushered in a second wave of funding cases.<sup>83</sup> The cases in this wave, which ran from 1973 to 1989, focused on a state constitution's education article and/or equality provisions.<sup>84</sup> During this time, twenty-two significant opinions were issued by state supreme courts.<sup>85</sup> However, plaintiffs prevailed in only seven cases.<sup>86</sup>

Education reformers again adjusted their strategy, and in 1989 began the third wave of finance reform. In this wave of cases, plaintiffs argued that their state's finance distribution formula was "inadequate" to meet the minimum education standards required by the state's constitution.<sup>87</sup> These cases met with more success than the second wave; out of the twenty-five decisions handed down in the so-called "adequacy" cases, plaintiffs won nineteen.<sup>88</sup> Some victories even came in states such as Idaho and South Carolina that had previously rejected "equity" arguments.<sup>89</sup>

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79. *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).

80. *Id.* at 481, 500.

81. *Id.* at 513.

82. *Id.* at 520.

83. William S. Koski, *The Politics of Judicial Decision-Making in Educational Policy Reform Litigation*, 55 HASTINGS L.J. 1077, 1085 (2004).

84. William S. Koski, *Symposium: Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1189 (2003).

85. *Id.*

86. *Id.*; see also *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90 (Ark. 1983); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976); *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977); *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973); *Seattle Sch. Dist. No. 1 v. State*, 585 P.2d 71 (Wash. 1978); *Pauley v. Kelley*, 255 S.E.2d 859 (W. Va. 1979); *Washakie County Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

87. R. Craig Wood, *Education: Constitutional Challenges to State Education Finance Distribution Formulas: Moving from Equity to Adequacy*, 23 ST. LOUIS U. PUB. L. REV. 531, 551 (2004).

88. ACCESS, SCHOOL FUNDING "ADEQUACY" DECISIONS IN THE 50 STATES, <http://www.schoolfunding.info/litigation/adequacydecisions12-7-04.pdf> (last visited Sept. 22, 2005).

89. Wood, *supra* note 87, at 551; ACCESS, LITIGATION OVERVIEW, <http://www.schoolfunding.info/litigation/litigation.php3> (last visited Mar. 9, 2005); see *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975) (rejecting attack on school finance system on equal protection grounds); *Richland Co. v.*

In one of the most famous cases from this era, *Rose v. Council for Better Education*, sixty-six property-poor rural school districts in Kentucky argued that the state failed to meet its constitutional mandate of providing “an efficient system of common schools.”<sup>90</sup> The Kentucky Supreme Court concluded that once a state’s citizenry commit to educating children in public schools, the government cannot abrogate that obligation simply because it becomes expensive.<sup>91</sup> The court held that “[t]he system of common schools must be adequately funded to achieve its goals . . . . Each child, *every child*, in this Commonwealth must be provided with an equal opportunity to have an adequate education.”<sup>92</sup> The court then held that the state education system must have as a goal to provide children sufficient training in seven explicit areas, including oral and written communication skills, government processes and the arts.<sup>93</sup>

No major “adequacy” challenge has yet been brought in California. However, this line of cases, along with other related causes of action recently brought in other states, provides a glimpse as to what could be in store for California. The rest of Part II looks more closely at a few specific cases that may be particularly revealing for California’s future.

#### B. NEW JERSEY: ON THE FINANCING FOREFRONT

With the landmark 1973 decision in *Robinson*, New Jersey quickly became a model for education reformers everywhere. But advocates in New Jersey were not satisfied. Unhappy with the reforms implemented by the legislature, the Education Law Center filed *Abbott v. Burke* in 1981.<sup>94</sup> In the ensuing twenty-five years, *Abbott* has drawn ten decisions from the New Jersey Supreme Court alone, pushing the education reform movement to new heights and dramatically reshaping the landscape of the state’s education system.<sup>95</sup>

*Abbott*, with a class initially consisting of all children in four urban school districts, challenged the Public School Education Act of 1975 as violating the “thorough and efficient” clause of the state constitution.<sup>96</sup>

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Campbell, 364 S.E.2d 470 (S.C. 1988) (affirming dismissal of “equity” suit). *But see* Idaho Schs. for Educ. Opportunity v. Evans, 850 P.2d 724 (Idaho 1993) (holding that an “adequacy” claim should go to trial); Abbeville Co. Sch. Dist. v. State, 515 S.E.2d 535 (S.C. 1999) (upholding claim based on education clause of state constitution).

90. 790 S.W.2d 186, 189 (Ky. 1989)

91. *Id.* at 208

92. *Id.* at 211.

93. *Id.* at 212.

94. EDUCATION LAW CENTER, HISTORY OF EDUCATION LAW CENTER, <http://www.edlawcenter.org/ELCPublic/AboutELC/History.htm> (last visited Mar. 10, 2005); *Abbott v. Burke*, 495 A.2d 376 (1985) [hereinafter *Abbott I*].

95. ACCESS, NEW JERSEY, at [http://www.schoolfunding.info/states/nj/lit\\_nj.php3](http://www.schoolfunding.info/states/nj/lit_nj.php3) (last visited Mar. 10, 2005).

96. *Abbott I*, 495 A.2d at 380. Ultimately the “*Abbott* districts” grew to thirty districts comprising

After initially being forced into administrative proceedings, a nine-month trial eventually took place, with the trial judge recommending a complete overhaul of the state's system of funding education in urban areas.<sup>97</sup> In 1990, almost ten years after the suit was initially filed, the New Jersey Supreme Court affirmed the trial court in a momentous opinion, holding:

A thorough and efficient education requires such level of education as will enable all students to function as citizens and workers in the same society, and that necessarily means that in poorer urban districts something more must be added to the regular education in order to achieve the command of the Constitution.<sup>98</sup>

The court went on to hold that the state must ensure that the plaintiff districts' "educational expenditures per pupil are substantially equivalent to those of the more affluent suburban districts, and that, in addition, their special disadvantages must be addressed."<sup>99</sup>

The legislature responded by passing the "Quality Education Act," which was soon challenged and declared unconstitutional by the supreme court in 1994 for not equalizing funding or creating supplemental programs.<sup>100</sup> In response, the state passed the Comprehensive Education Improvement and Financing Act, which also failed to bring urban districts to the same level of spending as suburban districts and thus was declared unconstitutional by the supreme court in 1997.<sup>101</sup> The court ordered the state to immediately increase funding for urban districts to the levels of the most successful districts and ordered a special hearing before a superior court judge to determine what supplemental programs the state needed to create.<sup>102</sup> In 1998, the supreme court ordered an implementation of the superior court's findings regarding supplemental programs, requiring, among other things, preschool for three- and four-year-olds, full-day kindergarten, improved security, modernized and less crowded facilities, vocational training, improved health and social services, and after-school programs.<sup>103</sup>

The Education Law Center has returned to court several times since that ruling, forcing the state to implement the order appropriately, particularly the school construction and preschool mandates.<sup>104</sup> Recently, efforts have focused on appropriately defining "low performing

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approximately twenty-five percent of the state's children. NEW JERSEY, *supra* note 95.

97. EDUCATION LAW CENTER, HISTORY OF ABBOTT, at <http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottHistory.htm> (last visited Oct. 18, 2005).

98. *Abbott v. Burke*, 575 A.2d 359, 403 (N.J. 1990) [hereinafter *Abbott II*].

99. *Id.* at 408.

100. HISTORY OF ABBOTT, *supra* note 97.

101. *Id.*

102. *Abbott v. Burke*, 693 A.2d 417, 439-40 (N.J. 1997) [hereinafter *Abbott IV*].

103. HISTORY OF ABBOTT, *supra* note 97.

104. *Id.*

schools.”<sup>105</sup> Ultimately, the New Jersey courts have ordered the most comprehensive set of programs and reforms for the education of disadvantaged students anywhere in the nation.<sup>106</sup> These reforms brought per-pupil spending in the poorest districts in the state inline with the most successful schools, implemented a standards-based education system, devoted billions of dollars to school construction efforts, and created crucial supplemental programs.<sup>107</sup> As a result, the *Abbott* litigation is considered by some to be “the most significant education case since the Supreme Court’s desegregation ruling nearly fifty years ago.”<sup>108</sup>

### C. NEW YORK: IF AT FIRST YOU DON’T SUCCEED . . .

As the “equity” wave spread across the country in the late 1970s, education reformers in New York filed *Board of Education v. Nyquist*.<sup>109</sup> The New York Court of Appeals, using rational basis scrutiny, determined that funding disparity between districts did not violate the state’s equal protection clause or education article.<sup>110</sup> However, the court did note that the education article required the state to provide a “sound basic education,” which would not be provided if a “gross and glaring inadequacy” existed.<sup>111</sup> A decade later, reformers made this principle the cornerstone of *Campaign for Fiscal Equity, Inc. v. New York*.<sup>112</sup>

The Campaign for Fiscal Equity plaintiffs—education groups, parents, children, and fourteen community school board districts in New York City—alleged that thousands of school children were “not receiving equal educational opportunities or an education meeting the minimum standards of educational quality and quantity” set by state officials.<sup>113</sup> Their complaint asserted that the state’s policy goals could not be met under the existing financing system because it did not provide adequate funding, was unduly complicated, inhibited local flexibility, had no accountability, did not allow for necessary professional development, and did not account for local differences in costs and wealth.<sup>114</sup> The complaint was initially dismissed by the lower courts, but in 1995 the New York Court of Appeals reversed, holding that the plaintiffs could

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105. ACCESS, NEW JERSEY SUPREME COURT ORDERS MEDIATION IN ONGOING ABBOTT PROCEEDINGS, <http://www.schoolfunding.info/news/litigation/11-15-04njspecialmaster.php3> (last visited Oct. 18, 2005).

106. HISTORY OF ABBOTT, *supra* note 97.

107. *Id.*

108. Editorial, *A Truce in New Jersey’s School War*, N.Y. TIMES, Feb. 9, 2002, at A18.

109. 439 N.E.2d 359 (N.Y. 1982).

110. *Id.* at 366–69.

111. *Id.* at 369.

112. 655 N.E.2d 661 (N.Y. 1995) [hereinafter *CFE I*].

113. Amended Complaint for Declaratory and Injunctive Relief at 2–5, *CFE I*, 655 N.E.2d 661 (No. 93111070), available at [http://www.cfequity.org/amended\\_complaint.pdf](http://www.cfequity.org/amended_complaint.pdf) (last visited Oct. 18, 2005).

114. *Id.* at 11.

prove the state's education article, as well as regulations for Title VI of the federal Civil Rights Act of 1964, were violated by the existing financing system.<sup>115</sup> The court found that a sound basic education must consist of the basic literacy, math and verbal skills necessary for children to eventually function as "civic participants capable of voting and serving on a jury."<sup>116</sup> It also said that children should have access to "minimally adequate instrumentalities of learning" like desks and current textbooks and "minimally adequate physical facilities and classrooms" with sufficient light, space, heat and air.<sup>117</sup>

After a lengthy trial, the trial judge found for the plaintiffs, ordering a major reform of the educational system.<sup>118</sup> An appellate court reversed, finding only minimal education guarantees, but the court of appeals sided with plaintiffs.<sup>119</sup> The court found that a "sound basic education" requires a "meaningful high school education," and agreed that increased funding would improve the performance of the schools.<sup>120</sup> The court rejected the state's arguments that funding inadequacies should be blamed on New York City, holding that "it is for the State . . . to consider corrective measures."<sup>121</sup> The court gave the state approximately one year to "ascertain the actual cost of providing a sound basic education in New York City" and create a system of accountability to ensure City schools will receive the necessary resources.<sup>122</sup>

On remand, the judge appointed a panel of three special masters to make recommendations after the state missed the court's deadline.<sup>123</sup> In November 2004, the panel recommended that the legislature provide more than \$5 billion in additional annual operating aid, provide more than \$9 billion for infrastructure improvements, and undertake a cost study every four years.<sup>124</sup> In February 2005, the judge affirmed the recommendations, giving the state ninety days to implement the ruling.<sup>125</sup> Independently of the court-ordered study, several private "costing out" studies were also conducted by researchers in New York to determine

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115. *CFE I*, 655 N.E.2d at 667, 670.

116. *Id.* at 666.

117. *Id.*

118. CAMPAIGN FOR FISCAL EQUITY, *CFE V. STATE: A CHRONOLOGY*, <http://www.cfequity.org/CFEchronology.PDF> (last visited Oct. 21, 2005).

119. *Id.*

120. Campaign for Fiscal Equity, Inc. v. State, 801 N.E.2d 326, 337, 340 (N.Y. 2003) [hereinafter *CFE II*].

121. *Id.* at 344.

122. *Id.* at 348-49.

123. ACCESS, NEW YORK, [http://www.accessednetwork.org/states/ny/lit\\_ny.php3](http://www.accessednetwork.org/states/ny/lit_ny.php3) (last visited Oct. 18, 2005).

124. *Id.*

125. CAMPAIGN FOR FISCAL EQUITY, *CFE V. STATE OF NEW YORK: CFE TO PUSH FOR SUPPLEMENTAL EDUCATION BUDGET*, <http://www.cfequity.org/03-10-05budget.htm> (last visited Oct. 18, 2005).

how much money the state should be spending on education.<sup>126</sup> The studies recommended between \$2.5 billion and \$9 billion in increased spending, in addition to the money necessary for infrastructure improvements.<sup>127</sup>

#### D. ARKANSAS: EQUAL EDUCATION A BASIC RIGHT

Education reformers in Arkansas, like those in New Jersey, won an early victory using an “equity” argument, but were unsatisfied with the results. After the Arkansas Supreme Court ruled in *Dupree v. Alma School District No. 30*<sup>128</sup> in 1983 that the state’s financing system lacked a legitimate state purpose and rational relationship to educational needs, the state enacted a series of reforms.<sup>129</sup> But these reforms failed to correct many of the problems present in the system. In 1992, the officials of Lake View School District and some district residents filed suit against the state, charging that the system violated the Education Article and Equality provisions of the state constitution and the Equal Protection Clause of the United States Constitution.<sup>130</sup>

The trial court found for the plaintiffs on the violations of the state constitution, and the legislature passed several bills to fix the system.<sup>131</sup> But the still dissatisfied plaintiffs continued the suit, expanding the class to include all the school districts in the state, as well as all students, parents and taxpayers in those districts.<sup>132</sup> The suit was eventually dismissed as moot by the trial court after a constitutional amendment passed, but the state supreme court reversed, saying mootness cannot be determined without a trial on the constitutionality of the initiatives.<sup>133</sup> A trial ensued, with the judge finding the funding system “inequitable and inadequate” under the Arkansas constitution.<sup>134</sup> The court, relying on the principles laid out in *Rose v. Council for Better Education*, held that in order to be adequate, the system must be based on the amount of money needed, and ordered an adequacy cost study.<sup>135</sup> The supreme court affirmed, stating:

It is the State’s responsibility, first and foremost, to develop forthwith what constitutes an adequate education in Arkansas. It is, next, the

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126. NEW YORK, *supra* note 123.

127. *Id.*

128. 651 S.W.2d 90 (Ark. 1983).

129. ACCESS, ARKANSAS, [http://www.accessednetwork.org/states/ar/lit\\_ar.php3](http://www.accessednetwork.org/states/ar/lit_ar.php3) (last visited Oct. 18, 2005).

130. Lake View Sch. Dist. No. 25 v. Huckabee, 91 S.W.3d 472, 477 (Ark. 2002) [hereinafter *Lake View III*].

131. *Id.* at 477–78.

132. *Id.* at 478.

133. Lake View Sch. Dist. No. 25 v. Huckabee, 10 S.W.3d 892, 898–900 (Ark. 2000) [hereinafter *Lake View II*].

134. ARKANSAS, *supra* note 129.

135. *Id.*



State's responsibility to assess, evaluate, and monitor, not only the lower elementary grades for English and math proficiency, but the entire spectrum of public education across the state to determine whether equal educational opportunity for an adequate education is being substantially afforded to Arkansas' school children. It is, finally, the State's responsibility to know how state revenues are being spent and whether true equality in opportunity is being achieved. Equality of educational opportunity must include as basic components substantially equal curricula, substantially equal facilities, and substantially equal equipment for obtaining an adequate education. The key to all this, to repeat, is to determine what comprises an adequate education in Arkansas. The State has failed in each of these responsibilities.<sup>136</sup>

However, the court reversed the trial court's order to create a state preschool program, holding that it was not constitutionally required and was a policy decision belonging to the legislature.<sup>137</sup>

The court gave the state a year to perform a cost study and reform the system.<sup>138</sup> After the state missed this deadline, the court appointed two former justices as special masters.<sup>139</sup> They submitted their report in April 2004, finding, among other things, that the state cannot offer equal educational opportunities without early childhood programs for disadvantaged children.<sup>140</sup> Meanwhile, the state conducted its own study, finding that funding for education needed to be increased by thirty-three percent in order to be adequate.<sup>141</sup> The report also recommended smaller class sizes, higher teacher salaries and preschool for all low-income children.<sup>142</sup>

#### E. MASSACHUSETTS: NO EGREGIOUS ABANDONMENT OF DUTY

In 1993, Massachusetts joined the wave of states overturning their educational systems for not fulfilling their constitutional duty to provide an adequate education.<sup>143</sup> In *McDuffy v. Secretary of the Executive Office of Education*, the Supreme Judicial Court found the system inadequate, adopting the *Rose v. Council for Better Education* principles that schools must provide students with sufficient communication skills, knowledge of political and economic systems, an understanding of governmental

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136. *Lake View III*, 91 S.W.3d at 500.

137. *Id.* at 502.

138. *Id.* at 511.

139. ACCESS, SPECIAL MASTERS REPORT ON COMPLIANCE IN ARKANSAS, OFFER FAVORABLE VIEWS ON EARLY CHILDHOOD EDUCATION AND CONSOLIDATION, <http://www.schoolfunding.info/states/ar/4-7-04mastersreport.php3> (last visited Oct. 18, 2005).

140. *Id.*

141. ACCESS, ARKANSAS "ADEQUACY STUDY" CALLS FOR INCREASED FUNDING AND RECOMMENDS MAJOR RESTRUCTURING, <http://www.schoolfunding.info/states/ar/9-4-03costingout.php3> (last visited Oct. 18, 2005).

142. *Id.*

143. *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993).

processes and a grounding in the arts, among other things.<sup>144</sup> Three days later, the legislature passed the Education Reform Act, shifting the system's reliance from property wealth and establishing standards and accountability measures.<sup>145</sup>

Although the Act did make improvements to the education system, some reformers were not satisfied. In 1999, children in nineteen school districts filed *Hancock v. Driscoll*, seeking further remedial relief.<sup>146</sup> A major trial ensued, with more than one hundred witnesses and one thousand pieces of evidence, although the focus was primarily narrowed to four particularly poor districts.<sup>147</sup> In April 2004, Judge Margot Botsford issued a 357-page fact-finding report about the four "focus districts" analyzing, among other things, demographics, funding, educational programming, technology, teacher qualifications, libraries, SAT scores, drop-out rates and even post-graduation plans of seniors.<sup>148</sup> The judge concluded that "not one of the districts is adequately implementing the Massachusetts curriculum frameworks, nor equipping its students with the capabilities described in *McDuffy*. In every one of these districts, therefore, the students are not receiving the level of education that the Commonwealth has a constitutional duty to provide."<sup>149</sup>

The judge also determined that the *McDuffy* standards could not be met under the existing finance structure.<sup>150</sup> Judge Botsford recommended the state conduct a study to determine the actual cost of providing all children with the capabilities outlined in *McDuffy* and the cost of improving district leadership, and then implement whatever funding and administrative changes were necessary to achieve the determined levels.<sup>151</sup> The judge also placed a major emphasis on the importance of early childhood programs, saying that for at-risk children, "a high quality preschool education program for three and four year olds offers the best and perhaps only realistic chance to achieve success in school thereafter."<sup>152</sup>

Despite the judge's detailed findings, the Supreme Judicial Council declined to adopt her conclusions.<sup>153</sup> Chief Justice Margaret Marshall

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144. *Id.* at 554.

145. ACCESS, *HANCOCK V. DRISCOLL CASE CONCLUDES IN MASSACHUSETTS*, <http://www.schoolfunding.info/news/litigation/2-27-05hancockdecision.php3> (last visited Oct. 18, 2005).

146. 2004 Mass. Super. LEXIS 118, \*1 (Mass. Super. Ct. Apr. 26, 2004) [hereinafter *Hancock I*].

147. GOOD SCHOOLS FOR MASSACHUSETTS, *TIMELINE IN THE CASE FOR SCHOOL FUNDING*, [http://www.goodschoolsformass.org/The\\_Facts/Time\\_Line\\_of\\_Case.html](http://www.goodschoolsformass.org/The_Facts/Time_Line_of_Case.html) (last visited Oct. 18, 2005).

148. *Hancock I*, 2004 Mass. Super. LEXIS 118, at \*1-5.

149. *Id.* at \*5.

150. *Id.* at \*8.

151. *Id.* at \*10.

152. *Id.* at \*9.

153. *Hancock v. Comm'r of Educ.*, 822 N.E.2d 1134, 1136-37 (Mass. 2005) [hereinafter *Hancock*].

reaffirmed the constitutional duty of the state to prepare its children to participate as citizens, and said the question is not whether more money was needed but rather, how much was needed.<sup>154</sup> But she noted that the state's "education clause leaves the details of education policymaking to the governor and legislature," and given the considerable progress they had made since *McDuffy*, the state was no longer violating the education clause.<sup>155</sup> According to Marshall, "[a] system mired in failure has given way to one that, although far from perfect, shows a steady trajectory of progress."<sup>156</sup> The Chief Justice distinguished New Jersey's *Abbott v. Burke* and New York's *Campaign for Fiscal Equity v. State*, noting that those decisions were made after years of failure by the state government to reform their educational systems.<sup>157</sup> Meanwhile, the court noted, Massachusetts politicians had responded to *McDuffy* with

a comprehensive and systematic overhaul of State financial aid to and oversight of public schools. The level of responsive, sustained, intense legislative commitment to public education established on the record in this case is the kind of government action the *Abbott* and *CFE* courts, in the respective underlying cases, had hoped to see from their Legislatures, and reluctantly concluded would not be forthcoming without a detailed court order.<sup>158</sup>

### III. A RETURN TO THE COURTS: *Williams v. State*

As the wave of "adequacy" cases raced through courtrooms across the country, the birthplace of the school finance litigation was strangely quiet. After the *Serrano* litigation finally ended in 1986, there were no major challenges to California's financing system for more than a decade. Reformers instead turned their focus toward state-wide initiatives, seeking to undo the devastating effects of Proposition 13 and the Gann limit.<sup>159</sup>

However, in 1999 the ACLU and Johnnie Cochran reignited a litigation strategy, filing *Daniel v. California*.<sup>160</sup> The plaintiffs, African-American and Latino high school students in Inglewood, claimed they were being denied equal and adequate access to Advanced Placement courses in violation of the equal protection and education clauses of the state constitution.<sup>161</sup> The suit, which became a statewide class action, was eventually settled after the state legislature passed the "Advanced

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154. *Id.* at 1137, 1157 (Marshall, C.J., concurring).

155. *Id.* at 1152-53.

156. *Id.* at 1139.

157. *Id.* at 1153-54.

158. *Id.* at 1154.

159. *See supra* Part I.C.

160. Complaint, *Daniel v. State*, No. BC214156 (L.A. Super. Ct. July 27, 1999), available at <http://classes.ils.edu/archive/manheimk/civrts/inglewood.html> (last visited Oct. 14, 2005).

161. *Id.*

Placement Challenge Grant Program.”<sup>162</sup> The suit, however, was just a foreshadowing of what was about to occur.

#### A. SCHOOLS THAT “SHOCK THE CONSCIENCE”

On May 17, 2000—the 46th anniversary of *Brown v. Board of Education*—a coalition of groups led by the ACLU, Public Advocates and Morrison & Foerster filed *Williams v. State*, a lawsuit in San Francisco Superior Court on behalf of students in eighteen schools.<sup>163</sup> The suit was soon expanded to include forty-six schools throughout the state, including schools in Oakland, San Francisco, Fresno, Visalia and Los Angeles County.<sup>164</sup> These schools, according to the ACLU, were “so grossly inferior that the conditions simply shock the conscience.”<sup>165</sup> On October 1, 2001, the class was again expanded, this time to include all students who attend or will attend public elementary, middle or secondary schools in California and are deprived of one or more basic educational necessities.<sup>166</sup>

The complaint charged that tens of thousands of children were “being deprived of basic educational opportunities available to more privileged children” because their schools lacked “the bare essentials required of a free and common school education.”<sup>167</sup> The plaintiffs laid out a bleak and appalling picture of their schools, alleging that they lacked sufficient classrooms, desks, qualified teachers, books, healthy and safe facilities and even functioning bathrooms, and that some schools were infested with rats and cockroaches.<sup>168</sup> The plaintiffs, almost entirely minorities, also noted that in forty-two of the forty-six schools named, “nonwhite students constitute far more than half the student body,” and that in thirty-seven of the schools, more than half the students were eligible for free or reduced-price lunches.<sup>169</sup>

In seven different causes of action, the plaintiffs argued that these

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162. ACLU of S. CAL., DOCKET SUMMARY 2 (Feb. 14, 2005), [http://www.aclu-sc.org/attachments/a/ACLU\\_Docket.pdf](http://www.aclu-sc.org/attachments/a/ACLU_Docket.pdf).

163. First Amended Complaint for Injunctive and Declaratory Relief at 1, *Williams v. State*, No. 312236 (S.F. Super. Ct. May 17, 2000), available at <http://www.decentschools.org/courtdocs/01FirstAmendedComplaint.pdf> [hereinafter First Amended Complaint]; ACLU of N. Cal., *Landmark Case Challenges Pervasive Substandard Conditions in Schools*, ACLU News, July/Aug. 2000, <http://aclunc.org/aclunews/news42000/schools-lawsuit.html> (last visited Oct. 14, 2005).

164. First Amended Complaint, *supra* note 163, at 7, 11–20.

165. ACLU News, *supra* note 163 (quoting Dorothy Ehrlich, Executive Director, ACLU of N. Cal.) (internal quotation marks omitted).

166. Memorandum of Points & Authorities in Support of Plaintiffs’ Motion for Class Certification at 1–2, *Williams*, No. 312236, available at <http://www.decentschools.org/courtdocs/19MotionForClassCert.pdf>; Order Granting a Motion to Certify Class at 1, *Williams*, No. 312236, available at <http://www.decentschools.org/courtdocs/24OrderGrantingMotion.pdf>.

167. First Amended Complaint, *supra* note 163, at 6.

168. *Id.*

169. *Id.* at 6–7.

conditions violated both state and federal law. Specifically, they said the state's failure to provide even the minimal education tools needed to pass mandatory graduation tests violated "every concept of fundamental fairness and due process" as well as article I, sections 7(a) and 15 of the California Constitution.<sup>170</sup> They alleged that the range of disparities violated the state's equal protection clauses found in article I, section 7(a) and article IV, section 16(a) of the Constitution.<sup>171</sup> The plaintiffs also claimed that article IX, section 1 of the California Constitution imposes on the state "a nondelegable duty to provide to each student Plaintiff and each member of the Plaintiff class and subclass the opportunity to obtain a basic education," and that the schools' conditions violated article IX, section 5 of the state Constitution, which requires the state to provide a free education in a system of common schools.<sup>172</sup> Additionally, they contended that maintaining the schools so as to have a racially discriminatory impact violated Title VI of the Civil Rights Act of 1964, as well as 42 U.S.C. § 2000d and 34 C.F.R. § 100.3(b)(2).<sup>173</sup> Finally, the plaintiffs alleged that the state had violated section 51004 of the Education Code and section 526a of the California Code of Civil Procedure.<sup>174</sup> As relief, the complaint sought to compel the state to "ensure that every child in California has an opportunity to obtain a basic education" and "ensure that no child is compelled to attend a fundamentally unequal school that lacks those requirements of a basic education that are provided to most children."<sup>175</sup>

The conditions described by the plaintiffs in their complaint were indeed shocking. According to the plaintiffs, at Balboa High School in San Francisco, the building was infested with mice, a class of fifty-four students had only thirty desks, and the 1200-student school had only one bathroom with four stalls available for girls, in which "[a] soiled feminine napkin and a moldy ice cream bar remained" for an entire school year.<sup>176</sup> At San Francisco's Bryant Elementary School, thirty-seven fifth-grade students shared twenty social studies textbooks, and temperatures in some classrooms reached ninety-two degrees, while on cold days students had to wear coats and mittens in class.<sup>177</sup> Some students at Susan Miller Dorsey Senior High School in Los Angeles had to stand or sit on counters for the entire school year because of the lack of desks, some classes did not have any books at all, and broken windows sat exposed

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170. *Id.* at 8, 11.

171. *Id.* at 11.

172. *Id.* at 10-11.

173. *Id.* at 72.

174. *Id.* at 73.

175. *Id.* at 11-12.

176. *Id.* at 28.

177. *Id.* at 28-29.

for two years.<sup>178</sup>

#### B. CRUMBLING PLASTER, LEAKING ROOFS, AND OVERCROWDED CLASSROOMS

The plaintiffs' efforts were helped significantly by sixteen expert reports prepared by researchers examining the condition of California's schools.<sup>179</sup> Another expert report filed by UCLA education professor Jeannie Oakes summarized and explained the implications of these studies.<sup>180</sup> Oakes's report analyzed the "essential conditions" of an adequate education: the quality of teachers, the availability of adequate teaching materials, and the appropriateness of school facilities.<sup>181</sup> The report also examined the pattern of distribution for these conditions, assessed past policies, and suggested policy alternatives.<sup>182</sup>

Oakes started out by explaining why "[t]eachers, textbooks and facilities are key requirements for educational quality and opportunity."<sup>183</sup> According to one study cited, the strongest predictor of student achievement is teacher qualification.<sup>184</sup> Oakes also concluded that for low-income students, access to books, teaching materials and technology is particularly crucial.<sup>185</sup> Another study, controlled for socioeconomic status, showed significant achievement gaps between students in poor facilities and those in above-standard buildings.<sup>186</sup> There were also correlations between school overcrowding and test scores and absenteeism.<sup>187</sup> Oakes also cited studies showing that poor school conditions convey a message of racial inferiority, leading to negative psychological impacts.<sup>188</sup>

The Oakes report then detailed how California schools were lacking. In almost one-fourth of California's schools, more than twenty percent of the teachers were not credentialed.<sup>189</sup> State-wide, there were approximately 40,000 teachers with emergency permits, and 3,000 more had not even passed the basic skills exam necessary for a permit.<sup>190</sup> Those unqualified teachers were also disproportionately found in schools with

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178. *Id.* at 46-47.

179. The sixteen reports are available at <http://www.decentschools.org/experts.php?sub=per>.

180. JEANNIE OAKES, EDUCATION INADEQUACY, INEQUALITY, AND FAILED STATE POLICY: A SYNTHESIS OF EXPERT REPORTS PREPARED FOR WILLIAMS V. STATE OF CALIFORNIA I, [http://www.decentschools.org/expert\\_reports/oakes\\_report.pdf](http://www.decentschools.org/expert_reports/oakes_report.pdf).

181. *Id.* at 1.

182. *Id.*

183. *Id.* at 4.

184. *Id.* at 5-6.

185. *Id.* at 7.

186. *Id.* at 8.

187. *Id.*

188. *Id.* at 10-11.

189. *Id.* at 18.

190. *Id.*

the highest minority enrollments; schools with the highest rates of minorities and highest rates of English language learners (ELLs) had on average six times the percentage of teachers not fully credentialed than schools with the fewest minorities or ELLs.<sup>191</sup>

Additionally, almost twelve percent of California teachers did not have enough textbooks to use in class.<sup>192</sup> Almost one-third of teachers did not have enough books for students to bring home, including teachers at eighty-seven percent of the high schools in the Los Angeles Unified School District.<sup>193</sup> As with credentialing, these problems were much more prevalent in schools serving primarily low-income students.<sup>194</sup> Finally, regarding facilities, ten percent of state teachers identified their schools as being in "poor" condition, and another study showed that forty-two percent of schools contained at least one "inadequate" building.<sup>195</sup> More than one-fourth of teachers indicated their school had a problem with mice, rats or cockroaches, and one-third of teachers said some classes in their schools were held in rooms that were not classrooms.<sup>196</sup> Not surprisingly, these problems predominantly occurred in schools with high concentrations of minorities, particularly Latino students.<sup>197</sup>

Numerous studies indicated that the aforementioned problems involving teacher qualifications, inadequate materials and poor facilities tended to occur all in the same schools.<sup>198</sup> Oakes cited three unnamed schools as emblematic of such schools, describing one of them as follows:

Disrepair is everywhere. Graffiti covers many of the windows of the portable classrooms, as well as the exterior walls of the school buildings. The very few bathrooms for students or faculty frequently lack toilet paper, soap, and/or paper towels. The water fountains do not always work. The classrooms often have cockroaches. Although a large playing field surrounds two sides of the school, but (sic) the school provides no play equipment. During recess, students must entertain themselves or use materials provided by individual teachers. One teacher observed, "They usually run around and fight."

Most [of the school's] teachers are inexperienced, only 10% hold full credentials; several are recent arrivals from Spain. Teacher absences are frequent and the turnover rates are very high. In 2000–2001, for example, twelve of the school's thirty-eight teachers left. [The school's] high teacher absenteeism and tardiness rates are particularly troublesome because the school has difficulty finding enough substitutes. Often, the administrators split absent teachers' students up

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191. *See id.* at 19.

192. *Id.*

193. *Id.* at 19–20.

194. *Id.* at 20.

195. *Id.* at 21 (internal citations and quotation marks omitted).

196. *Id.* at 22.

197. *Id.* at 22–23.

198. *Id.* at 24–26.

among other teachers. Last year, for example, one teacher had extra students for 56 out of 180 instructional days. When these students arrive, typically with no materials, teachers must modify their instructional plans. When substitutes can be found, their quality is “hit and miss,” with teachers often finding their rooms damaged and their students having done no work upon their return.<sup>199</sup>

Oakes also alleged that these problems and disparities were known to state officials for two decades, but had gone uncorrected.<sup>200</sup> In fact, Oakes contended state officials exacerbated the disparities by relying on test-based accountability measures and failing to establish clear standards, collect data and address inadequacies.<sup>201</sup> Oakes blamed these failures on “[s]ystemic flaws in the state’s governance of the educational system,” including a fragmented and incoherent policymaking approach, a finance system lacking sufficient cost data, and too much delegation of responsibility to local districts.<sup>202</sup> As a remedy, Oakes recommended mandating and building capacity to achieve qualified teachers, sufficient books, and adequate facilities; closely studying the implementation of these efforts; and developing effective state oversight.<sup>203</sup>

### C. DEFENDING THE INDEFENSIBLE

Faced with overwhelming evidence of the decrepit state of many of their schools serving low-income and minority students, the state had a difficult task. Rather than challenging this evidence or arguing that the plaintiffs were not entitled to an equal education, the State tried to shift the debate. In a demurrer filed in October 2000, defendants argued that the plaintiffs had not shown a constitutional violation because, under *Butt v. State*,<sup>204</sup> a school district’s educational program must be “viewed as a whole” and is only unconstitutional if it falls “fundamentally below” prevailing standards.<sup>205</sup> They argued that the plaintiffs had failed to view the districts as a whole and allege a state-wide standard, but rather focused on “highly specific problems . . . at a small fraction of schools.”<sup>206</sup> They also argued that the plaintiffs had failed to exhaust their administrative remedies.<sup>207</sup>

The court, however, found that the elementary requirements of

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199. *Id.* at 14.

200. *Id.* at 27, 32.

201. *Id.* at 32–33.

202. *Id.* at 43–44.

203. *Id.* at 58–66.

204. 842 P.2d 1240 (Cal. 1992).

205. Memorandum of Points & Authorities in Support of Demurrer of Defendant State of California to Plaintiffs’ First Amended Complaint at 1–2, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/02MPAInSupportOfDemurrer.pdf> (last visited Oct. 12, 2005).

206. *Id.* at 2–3.

207. *Id.* at 18.



pleading were met.<sup>208</sup> In November 2000, Judge Peter Busch ruled that the plaintiffs' allegations, if believed, were sufficient to establish that they were not receiving the level of education they were entitled to receive.<sup>209</sup> He also said the fact that the "State has chosen to carry out certain of its obligations through local school districts does not absolve the State of its ultimate responsibility."<sup>210</sup> Finally, he determined that since the case was "exclusively about the State's system of oversight and that system's alleged inadequacies and failures," rather than correcting specific deficiencies, administrative remedies were not appropriate.<sup>211</sup>

The State's next strategy, filed several weeks after Judge Busch's demurrer order, was to bring a cross-complaint against the individual school districts in which the plaintiffs lived.<sup>212</sup> The State claimed that if the conditions were as the plaintiffs alleged, the school districts themselves had violated California statutes and regulations and their constitutional duties and obligations.<sup>213</sup> The State sought to enjoin the school districts from continuing these violations, and recover from them financially for any costs from the litigation.<sup>214</sup> The school districts and plaintiffs joined together for a motion to sever the cross-complaint and stay its proceedings until the original complaint was resolved.<sup>215</sup> Judge Busch found that the cross-complaint raised separate and distinct issues, and in May 2001 granted the motion.<sup>216</sup>

Next, the State moved for summary judgment against the plaintiffs from Cloverdale High School, alleging that their claims of insufficient textbooks and a lack of air conditioning were unsupported by the evidence.<sup>217</sup> The plaintiffs responded by pointing out that Cloverdale's principal had filed a declaration supporting plaintiffs' claims, and that they had requested additional discovery regarding state standards for

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208. Order on State Demurrer at 3, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/08OrderOnStateDemurrer.pdf> (last visited Oct. 10, 2005).

209. *Id.* at 2.

210. *Id.* at 1-2.

211. *Id.* at 2.

212. Cross-Complaint for Specific Relief and Injunction at 1-6, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/09CrossComplaint.pdf> (last visited Oct. 10, 2005). Note that the cross-complaint was filed before the suit was expanded into a state-wide class action.

213. See, e.g., *id.* at 111.

214. See, e.g., *id.* at 146-47.

215. Order Granting Motion of Fresno Unified School District & San Francisco Unified School District & Motion of Plaintiffs to Sever and Stay Proceedings at 1, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/20OrderMotionToSeverAndStay.pdf> (last visited Oct. 10, 2005).

216. *Id.* at 2-3.

217. Memorandum of Points & Authorities in Support of Motion of Defendant State of California for Summary Judgment or, in the Alternative, for Summary Adjudication as to the First, Second, Third, Fourth, and/or Seventh Causes of Action Brought by the Cloverdale Plaintiffs at 5-6, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/01MemoSuppMotionSumJudg.pdf> (last visited Oct. 10, 2005).

textbooks and temperature.<sup>218</sup> They also argued that state law prohibits the granting of a summary judgment motion when it would not completely adjudicate any cause of action.<sup>219</sup> In April 2001, Judge Busch again sided with the plaintiffs, noting that the Cloverdale students were merely a subset of plaintiffs and therefore no cause of action would be completely disposed of.<sup>220</sup> The defendants did not drop the issue, petitioning the court of appeal for a writ of mandate, which the court granted in October 2001.<sup>221</sup> The court held that simply because numerous plaintiffs had joined together for a single cause of action does not mean that judgment against only one set of plaintiffs is not final.<sup>222</sup> However, just three months later the court of appeal denied defendants' petition to block Judge Busch's certification of the case as a state-wide class action.<sup>223</sup>

Following the court of appeal's acceptance of the class certification in January 2002, both sides went to the negotiating table, spending nine months trying to find a compromise.<sup>224</sup> After talks broke down, the defendants again returned to picking apart the lawsuit, even arguing they did not have a responsibility to provide clean bathrooms.<sup>225</sup>

Their most important maneuver was a May 2003 motion for judgment on the pleadings regarding the plaintiffs' cause of action under the state constitution's education article: article IX, sections 1 and 5.<sup>226</sup> Reiterating that the state constitution allows for variations in school quality, the defendants argued that article IX does not create a right to "basic educational equality," that section 5 only prohibits the charging of

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218. Memorandum of Points & Authorities in Opposition to Defendants' Motion for Summary Judgment, or in the Alternative, for Summary Adjudication, as to All Causes of Action Brought by the Cloverdale Plaintiffs at 1-2, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/04OppMotionSumJudg.pdf> (last visited Oct. 10, 2005).

219. *Id.* at 1.

220. Order Denying Defendants' Motion for Summary Judgment, or in the Alternative, Summary Adjudication as to All Causes of Action Alleged by the Cloverdale Plaintiffs at 2-3, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/08OpPetitionWritMandate.pdf> (last visited Oct. 10, 2005).

221. *State v. Superior Court of San Francisco*, No. 312236, A094890, slip op. at 4-5 (Cal. Ct. App. Oct. 4, 2001) available at <http://www.decentschools.org/courtdocs/08OpPetitionWritMandate.pdf> (last visited Oct. 10, 2005).

222. *Id.*

223. *State v. Superior Court of San Francisco*, No. BC312236, A097369, slip op. at 1 (Cal. Ct. App. Jan. 16, 2002), available at <http://www.decentschools.org/courtdocs/02OrderPetitionWritMandate.pdf> (last visited Oct. 10, 2005).

224. Howard Blume, *Reading, Writing and Rats*, L.A. WEEKLY, Oct. 18-25, 2002, <http://www.laweekly.com/ink/02/48/news-blume2.php> (last visited Oct. 15, 2005).

225. *Id.*

226. Memorandum of Defendant State of California in Support of Motion For Judgment on the Pleadings as to Second Cause of Action in First Amended Complaint at 1-2, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/04GSstatempa2cofa.pdf> (last visited Oct. 10, 2005).

fees for school participation, and that section 1 may not be judicially enforced.<sup>227</sup> The plaintiffs countered that, when taken together, sections 1 and 5 did create a cause of action that guarantees education as a fundamental right.<sup>228</sup> They also alleged that article IX was “indistinguishable” from constitutional provisions in New York, North Carolina, South Carolina and Tennessee, all of which recognized an actionable substantive right to education.<sup>229</sup> Finally, the plaintiffs argued that although school quality may constitutionally vary, “the fundamental right to education in California is not satisfied merely because an institution is called a school.”<sup>230</sup>

In July 2003, Judge Busch granted the defendants’ motion.<sup>231</sup> His order stated that a constitutional provision cannot be self-executing when “it merely indicates principles, without laying down rules by means of which those principles may be given the force of law,” and that article IX, section 1 was the “quintessential example” of such a provision.<sup>232</sup> And while section 5 has been held to be self-executing in cases where a child was completely excluded from the public school system, this was not the case here.<sup>233</sup> Noting that the plaintiffs had specifically foregone a challenge based on the failings of specific schools and instead narrowly focused on “the state’s oversight and management of public education,” Judge Busch distinguished the case from the prior section 5 cases, as well as other state cases cited by the plaintiffs.<sup>234</sup> According to the judge, “a court would look in vain to the language of Section 5 for any guideline, mechanism, or procedures that would supply a sufficient rule on which to base a mandatory order directing the State to reform how it has chosen to oversee and manage public education.”<sup>235</sup> However, Judge Busch finished by stating that, despite the ruling, the state could not manage the system “in a way that would deprive students of their right to equal protection of the laws or deprive them of substantially equivalent educational opportunity.”<sup>236</sup>

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227. *Id.*

228. Plaintiffs’ Opposition To Defendant State of California’s Motion for Judgment on the Pleadings as to Second Cause of Action in First Amended Complaint at 2–3, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/03GSplopp2ofa.pdf> (last visited Oct. 10, 2005).

229. *Id.* at 8–9.

230. *Id.* at 12.

231. Order Granting Motion for Judgment on the Pleadings as to Second Cause of Action at 1, *Williams* (No. 312236), available at [http://www.decentschools.org/courtdocs/Order\\_Second\\_Cause.pdf](http://www.decentschools.org/courtdocs/Order_Second_Cause.pdf) (last visited Oct. 10, 2005).

232. *Id.* at 3 (quoting *Leger v. Stockton Unified Sch. Dist.*, 202 Cal. App. 3d 1448, 1455 (1988)).

233. *Id.* at 3–4.

234. *Id.* at 4.

235. *Id.* at 5.

236. *Id.* at 5–6.

#### D. A WATERSHED MOMENT

Before Judge Busch issued his order on the defendants' motion for judgment on the pleadings, the plaintiffs went back on the attack. From June to September 2003, they filed three motions for summary adjudication on their claims involving instructional materials,<sup>237</sup> school facilities,<sup>238</sup> and the length of the school year.<sup>239</sup> Both sides lined up an impressive array of experts that gave very different impressions of California's schools. The defense experts argued that even though some schools may have book shortages and unclean bathrooms, this did not affect the quality of education students received.<sup>240</sup> They alleged that the plaintiffs could not prove that qualified teachers, instructional materials and well-kept buildings had a direct effect on student achievement, specifically test scores.<sup>241</sup> According to the defense experts, the best way to improve educational quality was through the state's test-based accountability system.<sup>242</sup>

However, with a trial date set for August 2004, the state's legal bills reaching \$18 million, and the election of Arnold Schwarzenegger as governor, both sides eventually returned to the negotiating table.<sup>243</sup> Governor Schwarzenegger's office, intent on reaching an agreement, took on settlement negotiations directly.<sup>244</sup> This time it paid off.

On August 13, 2004, the *Williams v. State* parties announced a massive settlement.<sup>245</sup> Hailed by the ACLU as a "watershed moment for public education," the suit provided nearly \$1 billion in new funding to

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237. Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Summary Adjudication of the State's Duty to Ensure Equal Access to Instructional Materials for all California's Public School Students at 1, *Williams* (No. 312236), available at <http://www.decentschools.org/courtdocs/01GSMAPBooks.pdf> (last visited Oct. 10, 2005).

238. Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Summary Adjudication of the State's Duty to Ensure Equal Access to Decent School Facilities for all California's Public School Students at 1, *Williams* (No. 312236), available at [http://www.decentschools.org/courtdocs/MPA\\_Decent\\_School\\_Facs.pdf](http://www.decentschools.org/courtdocs/MPA_Decent_School_Facs.pdf) (last visited Oct. 10, 2005).

239. Memorandum of Points & Authorities in Support of Plaintiffs' Motion for Summary Adjudication of the State's Duty to Ensure Equal Access to Instructional Days for all California's Public School Students at 1, *Williams* (No. 312236), available at [http://www.decentschools.org/courtdocs/MPA\\_Support\\_Equal\\_Days.pdf](http://www.decentschools.org/courtdocs/MPA_Support_Equal_Days.pdf) (last visited Oct. 10, 2005).

240. Jeannie Oakes & Martin Lipton, "Schools That Shock the Conscience": *Williams v. California and the Struggle for Education on Equal Terms Fifty Years after Brown*, 19 BERKELEY WOMEN'S L.J. 353, 365 (2004).

241. *Id.* at 365-66.

242. *Id.* at 369-70.

243. Nanette Asimov, *Bitter Battle Over Class Standards: State Spends Millions to Defeat Students' Suit*, S.F. CHRON., May 5, 2003, <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/05/05/MN102341.DTL> (last visited Oct. 12 2005).

244. Notice of Proposed Settlement at 5, *Williams* (No. 312236), available at [http://www.decentschools.org/settlement/williams\\_notice\\_settlement.pdf](http://www.decentschools.org/settlement/williams_notice_settlement.pdf) (last visited Oct. 10, 2005).

245. ACLU of S. Cal., *ACLU and State of California Reach Settlement in Historic Williams Education Lawsuit*, ACLU/SC NEWS, Aug. 13, 2004, at <http://www.aclu-sc.org/News/Releases/100740/> (last visited Oct. 15, 2005).

California's public schools.<sup>246</sup> It guaranteed \$800 million over four years for schools scoring in the bottom three deciles on the statewide Academic Performance Index to make emergency repairs, \$138 million for schools in the bottom two deciles to purchase instructional materials, and \$50 million to increase the capacity of school districts to oversee and make emergency repairs to low performing schools, as well as cover the other costs of implementation.<sup>247</sup> The state also agreed to extend funding of at least \$200 million for the High Priority Schools Grant Program.<sup>248</sup>

Ten days later, Judge Busch granted preliminary approval of the settlement agreement.<sup>249</sup> Five bills were rushed through the legislature, and on September 29, 2004, Governor Schwarzenegger signed them into law.<sup>250</sup> Senate Bill 550 and Assembly Bill 2727 established minimum standards for school facilities, teacher quality, and instructional materials, as well as an accountability and enforcement structure.<sup>251</sup> This structure required schools to post material and facility standards in each classroom, mandated development of a uniform complaint system, and allowed the state to intervene in low-performing schools that were not meeting standards.<sup>252</sup> Assembly Bill 1550 pledged to eliminate multi-track, year-round schools by 2012.<sup>253</sup> Assembly Bill 3001 was directed at placing qualified teachers in low-performing schools, and made it easier for highly qualified out-of-state teachers to obtain jobs in California.<sup>254</sup> Finally, Senate Bill 6 appropriated the money for emergency facility repairs.<sup>255</sup> On March 23, 2005, Judge Busch gave his final approval to the settlement,<sup>256</sup> ending one of the most important lawsuits in the history of California education.

#### IV. LOOKING THROUGH THE FOG: THE ROAD AHEAD

The billion dollar *Williams* settlement will unquestionably help improve the educational experience of thousands of California's poorest students by providing for renovations to school facilities, allowing additional materials like textbooks to be purchased, and helping districts

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246. *Id.*

247. *See id.*; Notice of Proposed Settlement, *supra* note 244, at 7.

248. Notice of Proposed Settlement, *supra* note 244, at 7.

249. Order Regarding Approval of Settlement Notice and Schedule, Exhibit A, at 2, *Williams* (No. 3:12236), available at [http://www.decentschools.org/settlement/Order\\_re\\_Approval.pdf](http://www.decentschools.org/settlement/Order_re_Approval.pdf) (last visited Oct. 15, 2005).

250. *Id.* Exhibit A, at 2-3.

251. *Id.* Exhibit A, at 2.

252. *Id.* Exhibit A, at 3.

253. *Id.* Exhibit A, at 2-3.

254. *Id.* Exhibit A, at 2-3.

255. *Id.* Exhibit A, at 3.

256. California Department of Education, *Notice of Class Action Settlement in the Williams v. State of California Education Lawsuit*, <http://www.cde.ca.gov/eo/ce/wc/noticeenglish.asp> (last visited Oct. 16, 2005).

bring more qualified teachers into these schools. But the state still has far to go before its education system returns to a position of national prominence. Only one in fourteen of California's public high schools currently meets academic performance goals.<sup>257</sup> The state ranks near the bottom nationally in terms of per pupil expenditures, class size, and the amount spent on education compared to personal income.<sup>258</sup> And on national achievement tests, California students score only higher than Louisiana and Mississippi.<sup>259</sup> The billion dollar settlement, when distributed over a school system serving more than six million children in more than 9000 schools, is only a drop in the bucket of the overall K-12 education budget, which will top \$60 billion in 2005-2006.<sup>260</sup> The settlement benefits are also offset by losses of other funding that education advocates claim they are owed under Proposition 98 and a deal reached with Governor Schwarzenegger in 2004.<sup>261</sup>

It is obvious that the debate over California's school finance system is far from over. Public education advocates will continue to use litigation, initiatives and legislation to increase the amount of money the state spends on its schools, and their opponents will employ these same strategies in an attempt to reduce state expenditures. It is impossible to know how these battles will play out. But some of these battles can be predicted based on past strategies employed both in California and elsewhere.

#### A. AN ADEQUACY-BASED LAWSUIT

While the *Williams* plaintiffs did incorporate some themes from the adequacy wave of finance cases, the lawsuit was most certainly not a traditional adequacy case. In part to avoid being forced into administrative proceedings, the plaintiffs specifically forewent a challenge based on the failings of specific schools, instead focusing narrowly on the state's oversight and management of the school system and discussing the problems in terms of inequality.<sup>262</sup> This decision was strongly criticized by some groups, like the California School Board

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257. EdSourceOnline, EdSource 2005, FORUM FOCUSED ON REFORMING HIGH SCHOOLS, <http://www.edsource.org/forum05pro.cfm> (last visited Oct. 12, 2005).

258. See *supra* note 68 and text accompanying notes 67-70.

259. Michael Kolber, *Marks Poor for State's Schools: California Education Now Ranks Among the Nation's Worst in a Rand Corp. Study*, SACRAMENTO BEE, Jan. 4, 2005.

260. EDUCATION DATA PARTNERSHIP, STATE OF CALIFORNIA EDUCATION PROFILE, <http://www.ed-data.k12.ca.us> (follow "States" link under "Reports" heading, then ensure "profile of state" and "2003-2004" are chosen from the pulldown menus) (last visited Oct. 12, 2005); Office of the Secretary for Education, Governor Schwarzenegger's 2005-06 Education Budget Highlights, at <http://www.ose.ca.gov/edbudo5.pdf> (last visited Oct. 10, 2005). This amount includes approximately \$7.5 billion in federal funds. *Id.*

261. EdSourceOnline, THE GOVERNOR'S 2005-06 BUDGET, [http://www.edsource.org/news\\_fin\\_021505.cfm](http://www.edsource.org/news_fin_021505.cfm) (last visited Oct. 22, 2005).

262. See *supra* note 230 and accompanying text.

Association (CSBA), who were more interested in additional funding than additional regulations.<sup>263</sup>

This means that California is still ripe for an adequacy challenge, and it appears the groundwork for such a suit has already begun. At a November 2004 conference on revamping the state's education finance system held at Mills College, attendees raised the possibility of bringing an adequacy lawsuit.<sup>264</sup> The CSBA and other groups have also continued to push for California to provide "adequate funding," and have begun seriously considering additional litigation after Governor Schwarzenegger's proposed education cuts were announced in January 2005.<sup>265</sup> In February 2005, Michael Rebell, the Executive Director of the Campaign for Fiscal Equity (the organization behind New York's finance litigation), traveled to California to meet with a number of education groups, including the CSBA and California Teachers Association, and brief them on various litigation strategies and the adequacy movement.<sup>266</sup> Additionally, in March 2005 the Campaign for Quality Education alliance and Public Advocates held a summit at UCLA to begin creating a long-term strategy for reforming the school funding system to ensure that "every child in the state has access to a quality education."<sup>267</sup>

An adequacy lawsuit may be especially ripe because of Governor Schwarzenegger's decision to do away with the state's Quality Education Commission. In 2002, the state legislature created the commission to find out exactly how much money the state should be spending to provide children with an adequate education.<sup>268</sup> The study would have been similar to the "costing-out" studies done in about thirty other states, including the studies ordered by the courts in New York and Arkansas following adequacy litigation.<sup>269</sup> While the legislature and state superintendent appointed six members of the commission, Schwarzenegger refused to appoint the final member, preventing the

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263. CAL. SCH. BD. ASS'N, *THE WILLIAMS CASE*, at [http://www.csba.org/ela/williams\\_resources.htm](http://www.csba.org/ela/williams_resources.htm) ("Instead of addressing the adequacy of school resources, however, the suit sought to impose cumbersome regulations and monitoring of textbooks, facilities maintenance and teacher quality.") (last visited Oct. 19, 2005).

264. Jill Tucker, *Education Experts Push Funding*, OAKLAND TRIBUNE, Nov. 12, 2004.

265. CALIFORNIA SCHOOL BOARD ASSOCIATION, *supra* note 263; ACCESS, CALIFORNIA VISIT BY MICHAEL REBELL TO DISCUSS LITIGATION AND THE NATIONAL ADEQUACY MOVEMENT, at <http://www.accessednetwork.org/news/litigation/2-28-05rebellcalifornia.php3> (last visited Oct. 19, 2005) [hereinafter CALIFORNIA VISIT].

266. CALIFORNIA VISIT, *supra* note 265.

267. ACCESS, EDUCATION ADVOCATES ACROSS CALIFORNIA JOIN FORCES TO WIN REAL CHANGE, at <http://www.schoolfunding.info/news/advocacy/3-24-05californiasummit.php3> (last visited Dec. 10, 2005).

268. Jill Tucker, *Kirst Says Gov. Schwarzenegger Focusing on "Efficiency" in Education*, SAN MATEO COUNTY TIMES, Jan. 10, 2005.

269. *Id.*; *supra* Part II.C-D.

commission from meeting.<sup>270</sup> Then-Secretary of Education Richard Riordan announced in January 2005 the governor's intent to eliminate the commission entirely and replace it with a Governor's Commission on Education Excellence, which was to look at a broad range of issues and would not have been required to address adequacy.<sup>271</sup> The decision angered education advocates and prompted John Affeldt, one of the *Williams* plaintiffs lead attorneys, to say that "[t]he people who really don't want to know the answer are trying to keep us from getting the answer."<sup>272</sup> The criticism may have had some effect, because when the two-year commission was formally unveiled in April 2005, rechristened the Governor's Advisory Committee on Education Excellence, it did include studying the "distribution and adequacy of education funding," along with governance structures, teacher recruitment and training, and school administration.<sup>273</sup> It is unclear how detailed the adequacy research will be, and there is no indication that the committee will produce a "costing-out" analysis detailing how much additional school funding is necessary to provide all students with an adequate education. Additionally, since the committee is only advisory, Schwarzenegger is under no obligation to act on the results.

Schwarzenegger's concern over what a costing-out study might find is understandable. While the *Williams* lawsuit resulted primarily in a one-time payment of \$1 billion, the court-ordered study in New York mandated \$9 billion for infrastructure improvements and \$5 billion in additional *annual* funding.<sup>274</sup> Another New York study even recommended an increase of \$9 billion a year.<sup>275</sup> In Arkansas, a study conducted in response to the *Lake View* litigation found that a thirty-three percent increase in spending was necessary for an adequate education.<sup>276</sup> Such a finding in California would be disastrous to Schwarzenegger, given the state's poor fiscal situation and his opposition to new taxes. However, Schwarzenegger may be making his job even more difficult by resisting a costing-out study. If the state conducts a costing-out study voluntarily, it would have more control over its outcome, and could decide whether to implement some or all of the study's findings. But if a court orders such a study, the state may have little choice but to increase funding dramatically.

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270. Tucker, *supra* note 268.

271. *Id.*

272. *Id.*

273. SCHWARZENEGGER.COM, GOVERNOR SCHWARZENEGGER ANNOUNCES GOVERNOR'S ADVISORY COMMITTEE ON EDUCATION EXCELLENCE, at [http://www.schwarzenegger.com/en/news/uptotheminute/news\\_upto\\_EduExcellence.asp?sec=news&subsec=uptotheminute](http://www.schwarzenegger.com/en/news/uptotheminute/news_upto_EduExcellence.asp?sec=news&subsec=uptotheminute) (last visited Dec. 15, 2005).

274. See *supra* note 124 and accompanying text.

275. See *supra* note 127 and accompanying text.

276. See *supra* note 141 and accompanying text.



Schwarzenegger likely assumes, probably correctly, that any adequacy litigation and the ensuing cost study would not be concluded until long after he has left office. New Jersey is just now beginning to implement fully the mandates of *Abbott*, which was first filed twenty-five years ago. However, the results of any litigation will have to be dealt with by someone. Should an adequacy lawsuit be filed, the chances of success will be high. Plaintiffs have won nineteen of the twenty-five decisions handed down in the wave of adequacy cases.<sup>277</sup>

But how does California law compare to some of those states? The *Williams* plaintiffs alleged that the educational guarantees in California's constitution were virtually identical to those in New York's.<sup>278</sup> Indeed, they are quite similar. California's constitution requires the legislature to "provide for a system of common schools by which a free school shall be kept up and supported" and "encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement."<sup>279</sup> New York's constitution requires the legislature to "provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."<sup>280</sup> The New York courts have interpreted this provision as requiring the state "to ensure the availability of a 'sound basic education' to all its children."<sup>281</sup> A "sound basic education," in turn, requires schools to provide children with "the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury."<sup>282</sup>

The *Williams* plaintiffs also contended that California's provisions were similar to those in the Massachusetts constitution, noting that Massachusetts' highest court had recognized an adequate education requirement in *McDuffy*.<sup>283</sup> However, Massachusetts serves as a warning that simply because a state constitution guarantees an adequate education, that does not mean the court will find that a state is providing an inadequate education. Although the *McDuffy* court found that schools must provide students with sufficient communication skills, knowledge of political and economic systems, an understanding of governmental processes, and a grounding in the arts, Massachusetts' highest court in *Hancock* found that the state was meeting its

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277. See *supra* note 88 and accompanying text.

278. Plaintiff's Opposition to Defendant State of California's Motion for Judgment on the Pleadings as to Second Cause of Action in First Amended Complaint, *supra* note 228, at 8.

279. CAL. CONST. art. IX, §§ 1, 5.

280. N.Y. CONST. art XI, § 1.

281. CFE II, 801 N.E.2d 326, 328 (N.Y. 2003).

282. *Id.* at 330.

283. Plaintiff's Opposition to Defendant State of California's Motion for Judgment on the Pleadings as to Second Cause of Action in First Amended Complaint, *supra* note 228, at 9-10.

obligation.<sup>284</sup> Overruling the trial court's finding that certain schools were still vastly inadequate, the court held that the details of education policymaking should be left to the governor and legislature.<sup>285</sup>

However, this ruling does not necessarily dampen the chances of success in California. The *Hancock* court specifically stated that it based its decision in large part on the fact that the state had made significant improvements since the *McDuffy* holding, and in fact, Massachusetts now has the sixth highest expenditure per student of all the states (while California ranks thirty-fifth).<sup>286</sup> By virtually any measure, California's school system lags far behind that of Massachusetts.

One of the most difficult tasks a court faces when sitting in judgment on an adequacy case is deciding how to define an adequate education. While some courts use an "input" or "opportunity" approach, focusing on what resources schools and students are provided with, others focus on "output" or "outcome," looking at school and student achievement.<sup>287</sup> The output approach often measures school performance against a set of state standards. When existing standards are used as the measuring stick, the output approach has been criticized because it allows state officials to set an artificially low standard.<sup>288</sup> However, California recently settled a dispute with the federal Department of Education over its school standards, agreeing to adjust its formula so that 184 schools would be considered failing instead of the fourteen the state initially flunked.<sup>289</sup> This could make an output approach more appealing to a court because it is simple to apply. But an output approach can be difficult to enforce, as a court cannot simply force a state to increase students' academic performance. An input approach is easier for a court to enforce, and is a natural follow-up to the input measurements created by the *Williams* settlement.

No matter what measurement is used, there is a high probability that a court will decide that the state needs to increase its supplemental programs, particularly preschool and after-school programs. Courts in

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284. *McDuffy v. Sec'y of the Exec. Office of Educ.*, 615 N.E.2d 516, 554 (Mass. 1993); *Hancock II*, 822 N.E.2d 1134, 1152-53 (Mass. 2005).

285. *Hancock II*, 822 N.E.2d at 1152-53.

286. *Id.* at 1152; ED-DATA PARTNERSHIP, ALL STATES: STUDENTS PER TEACHER AND EXPENDITURES PER ADA, 2001-02 at <http://www.ed-data.k12.ca.us/> (follow "How California Compares" hyperlink; then follow "All States: Students per Teacher and Expenditures" hyperlink) (last visited Oct. 19, 2005).

287. See Rebell, *supra* note 74, at 242; Josh Kagan, Note, *A Civics Action: Interpreting "Adequacy" in State Constitutions' Education Clauses*, 78 N.Y.U. L. REV. 2241, 2249-57 (2003); Julie Zwibelman, Note, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 530 (2001).

288. Kagan, *supra* note 287, at 2249.

289. Nanette Asimov, *State, Feds Near Accord on "No Child Left Behind,"* S.F. CHRON., Mar. 9, 2005, at B1.

both the Arkansas and Massachusetts litigation found that their constitutions required the state to provide quality preschool programs for low-income children, and the *Abbott* court held that the state must provide both preschool and after-school programs.<sup>290</sup> There is overwhelming evidence that participation in quality early childhood and after-school programs, particularly for at-risk children, can dramatically increase future academic success and decrease crime, welfare, and unemployment.<sup>291</sup> California currently lacks a sufficient preschool or after-school system. Almost sixty percent of the state's low-income children eligible for preschool programs are not being served, and there is a severe shortage of funding for after-school programs.<sup>292</sup> Although in 2002 Californians did pass Proposition 49 (led, ironically, by Governor Schwarzenegger) with the intent of dramatically increasing funding for after-school programs, it does not take effect until state revenues reach a certain level, and it has been targeted by the state's legislative analyst as something the legislature should repeal.<sup>293</sup> Meanwhile proponents of universal preschool were forced to stop their efforts to place a \$4.5 billion preschool proposition on the 2004 ballot after it became clear it would not pass because of the massive budget deficit<sup>294</sup> (although Hollywood director Rob Reiner is planning to offer a \$2.3 billion a year "Preschool for All" initiative on the June 2006 ballot).<sup>295</sup>

## B. SYSTEMIC FINANCE REFORMS

An adequacy lawsuit could result in a substantial amount of new funding for California's schools. However, it would not necessarily mean a major systematic change in the way in which schools are funded. But that might not be far behind. In 1993, Michigan eliminated local school property taxes, choosing instead to fund schools through a state-wide

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290. See *supra* Part II.B, D-E.

291. See generally FIGHT CRIME: INVEST IN KIDS, AMERICA'S CHILD CARE CRISIS: A CRIME PREVENTION TRAGEDY (2000), available at <http://www.fightcrime.org/reports/childcarereport.pdf> (last visited Oct. 19, 2005); FIGHT CRIME: INVEST IN KIDS, AMERICA'S AFTER-SCHOOL CHOICE: THE PRIME TIME FOR JUVENILE CRIME OR YOUTH ENRICHMENT AND ACHIEVEMENT (2000), available at <http://www.fightcrime.org/reports/as2000.pdf> (last visited Oct. 19, 2005).

292. FIGHT CRIME: INVEST IN KIDS, PUBLIC SAFETY CAN'T WAIT: CALIFORNIA'S PRESCHOOL SHORTAGE 11 (2005), available at <http://www.fightcrime.org/ca/waitlist/capreschool.pdf> (last visited Oct. 19, 2005); FIGHT CRIME: INVEST IN KIDS, CALIFORNIA'S NEXT AFTER-SCHOOL CHALLENGE: KEEPING HIGH SCHOOL TEENS OFF THE STREET AND ON THE RIGHT TRACK 21-27 (2004), available at <http://www.fightcrime.org/ca/highschool/CAHSAS.pdf> (last visited Oct. 19, 2005).

293. Evan Halper & Jordan Rau, *Governor's School Plan Is Criticized*, L.A. TIMES, Feb. 25, 2005. Some experts believe the after-school requirement will be triggered in 2006. Jill Tucker, *School's Equation Simple: Show Me the Money California's Education System Could Benefit From Extra Money in State's Coffers*, OAKLAND TRIBUNE, Dec. 9, 2005.

294. Michael Finnegan & Duke Helfand, *Reiner Drops Initiative to Raise Taxes for Schools*, L.A. TIMES, Apr. 9, 2004, at B1.

295. Dana Hull, *Rob Reiner Pitches Preschool Plan to Leaders*, SAN JOSE MERCURY NEWS, Dec. 14, 2005.

sales tax and property tax.<sup>296</sup> In New Hampshire, following a 1997 state supreme court decision holding the school finance system unconstitutional because a “constitutionally adequate education is a fundamental right,” the state shifted the financing of schools away from local property taxes and installed a statewide property tax.<sup>297</sup> The new system required the state to provide each district with a subsidy necessary to provide a minimally adequate education, but allow local districts to raise additional funds.<sup>298</sup> Vermont’s financing system was also struck down by the state supreme court.<sup>299</sup> The state now provides a block grant of \$5000 per pupil, funded from a statewide property tax and a portion of revenues from local property taxes in districts spending in excess of \$5000, shifting money from property-rich districts to property-poor districts.<sup>300</sup>

Brett McFadden, a lobbyist for the Association of California School Administrators, thinks California’s biggest problem lies not with property taxes, but with the state’s over-reliance on personal income taxes as a source of general state revenue.<sup>301</sup> He notes that personal income taxes accounted for fifty-eight percent of the state’s general fund in 2001, compared to just thirty-five percent in 1980.<sup>302</sup> Almost half of the personal income taxes were from taxes on stock options and capital gains alone, which contributed to a major revenue drop when the dot-com bubble burst, and caused billions of dollars in education cuts.<sup>303</sup> McFadden advocates a more stable and diversified revenue structure that can adapt to rapid economic changes.<sup>304</sup>

At the November 2004 Mills College conference, in addition to an adequacy lawsuit participants also discussed several legislative and electoral approaches. One such suggestion was to amend Proposition 13 to allow for either an increase in property tax rates or a reassessment of

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296. DAVID HURST ET AL., NATIONAL CENTER FOR EDUCATION STATISTICS, OVERVIEW AND INVENTORY OF STATE EDUCATION REFORMS: 1990 TO 2000, at ix (2003).

297. *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 1359 (N.H. 1997); Hurst, *supra* note 296, at 48.

298. Erin E. Buzuvis, Note, “A” For Effort: Evaluating Recent State Education Reform in Response to Judicial Demands for Equity and Adequacy, 86 CORNELL L. REV. 644, 648 (2001). Although this specific plan was later struck down by the supreme court in *Claremont School District v. Governor*, 744 A.2d 1107 (N.H. 1999), because the tax phase-in favored the wealthiest districts, the basic structure of the new system has remained. See CLAREMONT COALITION, EDUCATION FUNDING LAWS, at [http://www.claremontlawsuit.org/education\\_funding\\_laws.htm](http://www.claremontlawsuit.org/education_funding_laws.htm) (last visited Oct. 21, 2005).

299. *Brigham v. Vermont*, 692 A.2d 384 (Vt. 1997).

300. Buzuvis, *supra* note 298, at 676–77.

301. Brett McFadden, *Revamping California’s Education Finance System*, LEADERSHIP MAGAZINE (Ass’n of Cal. Sch. Adm’ts), May 27, 2004, available at [http://www.acsa.org/publications/pub\\_detail.cfm?leadershipPubID=1418](http://www.acsa.org/publications/pub_detail.cfm?leadershipPubID=1418) (last visited Oct. 19, 2005).

302. *Id.*

303. *Id.*

304. *Id.*

commercial property.<sup>305</sup> Another proposal was to expand the state sales tax to apply to services in addition to the sale of goods.<sup>306</sup> A third proposal would lower the electoral threshold it takes to pass local tax initiatives.<sup>307</sup> Other proposals included giving money directly to schools instead of through the district, and giving schools a flat amount per student, with extra dollars for additional services like special education and English language instruction.<sup>308</sup>

On the other side of the debate, fiscal conservatives are already working on ways to reduce, or at least cap, school funding. Governor Schwarzenegger placed a proposition on the November 2005 special election ballot that would have given the Governor unilateral authority to cut spending when revenues fall below a certain level.<sup>309</sup> The proposition also would have amended Proposition 98 by eliminating key provisions ensuring minimal funding no matter the economic situation.<sup>310</sup> Education advocates declared an “all-out battle” on these proposals, contending Schwarzenegger broke a promise he made in 2004 to increase funding when he convinced education lobbyists to allow Proposition 98’s provisions to be temporarily suspended.<sup>311</sup> The California Teachers Association and other education advocates spent approximately \$100 million to defeat the initiative,<sup>312</sup> which ended up garnering less than thirty-eight percent of the vote.<sup>313</sup>

### C. A FOURTH WAVE?

While an adequacy lawsuit is quite likely, advocates have not ruled out bringing another lawsuit based on equality principles. A group of professors at the University of California at Berkeley, Boalt Hall School of Law have formed a project called “Rethinking Rodriguez.”<sup>314</sup> The group is considering mounting a school finance lawsuit based on federal constitutional rights with the hope of overruling *Rodriguez*.<sup>315</sup> Their goal

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305. Tucker, *supra* note 264.

306. *Id.*

307. *Id.*

308. Jackie Burrell, *Education Gurus Offer Ways to Fix Funding*, CONTRA COSTA TIMES, NOV. 11, 2004.

309. CAL. SEC’Y OF STATE, PROPOSITION 76: STATE SPENDING AND SCHOOL FUNDING LIMITS. INITIATIVE CONSTITUTIONAL AMENDMENT 1, at [http://www.ss.ca.gov/elections/bp\\_nov05/voter\\_info\\_pdf/entire76.pdf](http://www.ss.ca.gov/elections/bp_nov05/voter_info_pdf/entire76.pdf) (last visited Oct. 19, 2005).

310. *Id.*

311. Tom Chorneau, *Powerful School Lobby Challenges Governor Over Budget Cuts*, SFGATE.COM, Jan. 18, 2005, at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2005/01/18/state0312EST0007.DTL>.

312. Peter Schrag, *Compromise the Only Way to Improve California Schools*, SACRAMENTO BEE, Dec. 24, 2005.

313. California Secretary of State, State Ballot Measures, at <http://vote2005.asp.ca.gov>Returns/prop/00.htm> (last visited Dec. 15, 2005).

314. CALIFORNIA VISIT, *supra* note 265.

315. *Id.*

is to make education a fundamental right, that is, “a right belonging to all children, protected by an enforceable guarantee of ‘adequacy’ or ‘equality’ or both.”<sup>316</sup> They will have an uphill battle, but a Supreme Court finding that the United States Constitution guarantees all children an equal public education could have a monumental effect on the nation’s schools.

Along similar lines, Professor Denise Morgan predicts a “fourth wave” of school finance cases that makes use of a “distributive justice” argument.<sup>317</sup> She argues that such an approach allows suits to be brought under federal law that are currently untenable because the widely-used “corrective justice” approach requires proof of discriminatory intent.<sup>318</sup> The distributive justice approach is similar to the strategy used by the plaintiffs in *Daniel v. State*, challenging access to Advanced Placement classes.<sup>319</sup> Such suits can be brought under Title VI of the Civil Rights Act of 1964, which was also used as a basis for a cause of action in *Williams*. Morgan argues that such suits “have the potential to reinvigorate integration remedies—to the extent integration is necessary to ensure equal educational opportunity.”<sup>320</sup> This approach, she says, makes evidence of disproportionate impact sufficient to shift the burden of proof to the defendant to justify the disparity.<sup>321</sup> Morgan contends remedies from this approach will be better than those in adequacy lawsuits because they will focus on factors that have been most closely identified with positively influencing student achievement, such as smaller schools and challenging curricula, and will also reach outside the schools into job training programs, child care, health care and transportation.<sup>322</sup>

### CONCLUSION

The world of education has changed considerably since the day *Serrano v. Priest* was first filed thirty-five years ago. Despite the *Serrano* rulings, California has failed to improve the quality of education that many of the state’s children receive and, by many accounts, it has gotten even worse. Too many children go to school in conditions that shock the conscience. The *Williams* settlement will help remedy some of this travesty by providing more textbooks and repairing some schools. But

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316. THE CHIEF JUSTICE EARL WARREN INSTITUTE ON RACE, ETHNICITY AND DIVERSITY, RETHINKING RODRIGUEZ: EDUCATION AS A FUNDAMENTAL RIGHT, available at [http://www.law.berkeley.edu/centers/ewi/research/rethinking\\_rodriguez\\_call\\_for\\_papers-4\\_ce\\_june\\_8\\_2005.pdf](http://www.law.berkeley.edu/centers/ewi/research/rethinking_rodriguez_call_for_papers-4_ce_june_8_2005.pdf) (last visited Dec. 15, 2005).

317. Denise C. Morgan, *The New School Finance Litigation: Acknowledging That Race Discrimination in Public Education is More Than Just a Tort*, 96 NW. U. L. REV. 99, 173 (2001).

318. *Id.* at 164.

319. *Id.* at 167; see *supra* notes 160–62 and accompanying text.

320. Morgan, *supra* note 317, at 172.

321. *Id.* at 173.

322. *Id.* at 188.

the amount is simply inadequate to remedy the problem substantially. Because of this, there is no doubt that education advocates—and their opponents—are already hard at work planning the next set of challenges to the state's public school financing system.